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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1899.

HENRY CLEWS, CHARLES M. FOSTER and JAMES B. CLEWS,
Petitioners,
vs.
MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. BILLINGS et al.,
Respondents.

Petition for Certiorari.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

We have examined in vain the petition and brief of the petitioners for the statement of a single legal proposition, or a single phase of this case, which distinguishes it from the general mass of litigation in which the questions involved are of permanent interest only to the parties themselves. The case is one of very practical interest to the parties, but that interest is not, as counsel seem to imagine, one which is shared by the stock exchanges of the world, nor by the members of those exchanges, who daily transact business under rules and customs essentially different from those which are described in the record of this case. Indeed, even the construction of the rules and customs of the Chicago Stock Exchange has ceased to present a question of more than academic interest. For the rules and system of trading which gave rise to this case have since been abolished.

The case is, in our view, one whose extreme simplicity,

in point of law, does not require for its solution any incursion into the general fields of literature, either legal, poetic or economic. And, not having felt that mistiness of apprehension of the effect of these transactions, which counsel, in the concluding paragraph of their brief, say embarrassed their own efforts, until they had examined the English cases, we shall not attempt to follow the line of discussion which they have adopted. The statement that the contracts of sale daily made on the Stock Exchange—contracts which are made verbally and in a moment, by men who have themselves made the rules governing their execution—have in them some element of weird mystery, which makes it difficult for even a trained lawyer to understand their effect, would certainly suggest an inquiry as to why the laymen, who make the contracts, experience so little trouble in practically operating under them.

Summarizing the petitioners' claim, it is that they made with Jamieson & Co. a contract for the sale of 700 shares of Diamond Match stock; that Jamieson & Co. refused to take the stock when tendered, whereupon Clews & Co. sold it at a lower price, and seek to recover the difference. This is clearly the statement of a legal claim for unliquidated damages; and the theory of equitable jurisdiction must be sustained, if at all, upon the fact that a fund was deposited by Jamieson & Co. in the Stock Exchange as security for the performance of the contract. This fund is concededly much less than the amount of the petitioners' damages, and, as Jamieson & Co. are admitted to be abundantly solvent, there would seem to be no doubt that the legal remedy was amply adequate to the protection of all of the petitioners' rights. This objection was specifically pleaded in the answer to the amended bill. (*Record, p. 75.*)

But, turning from the question of the forum to the question of the parties' rights, the first proposition which naturally claims attention is the one on which the Court of Appeals decided the case; that is, the question whether, assuming that these parties actually entered into a contract with each other—an assumption which the decision of the Circuit judge completely refutes—the contract was void under the laws of Illinois with reference to gambling contracts.

Upon this question we have nothing to add to the review of the evidence and authorities contained in the opinion of the Court of Appeals. Certainly the whole theory of the case upon which opposing counsel rely to sustain the statement that these parties contracted with each other, confesses and demonstrates that they contemplated settling it by the payment of differences, and not by the delivery of property. The machinery of the Stock Exchange Clearing House, the method of settling the daily balances between brokers through its medium, the rules providing for this method of settlement, the actual resort to that clearing house method by Schwartz, Dupee & Co., in these transactions, and the fact that it is only through this machinery, which is designed for the settlement of contracts by the payment of differences, that the petitioners can make out their theory of the existence of any contract with respondents, all tend to sustain the view of the Court of Appeals.

It is perfectly true, as counsel say, that the defense of illegality was not pleaded in the answer. We think, however, that it will be time enough to consider that technical objection when some court repudiates the old principle that the enforcement of an illegal contract would be refused by a court, in the assertion of its own dignity, even

if the defendant consented to waive the defense. It certainly would furnish no reason for granting a *certiorari*.

Judge Grosscup, who decided the case in the Circuit Court, held that there was no contract at all between Clews & Co. and Jamieson & Co. A consideration of the successive steps which it is claimed created the contract, both as they are stated in the bill and in the evidence, will, we submit, show that his view of the case was correct.

The allegation of the contract in the amended bill is that in July, 1896, the petitioners ordered their brokers, Schwartz, Dupee & Co. to sell, for delivery on August 31, 1896, *700* shares of Diamond Match stock; that on August 3, 1896, Schwartz, Dupee & Co. sold to Jamieson & Co. *1,150* shares, deliverable on August 31st, at $222; that this sale was made by Schwartz, Dupee & Co. in their own name, but as to 700 shares they acted for the complainants, and as to the other 450 shares they acted for other clients. (*Record p. 63.*)

It will be noted, therefore, that the bill proceeds upon the theory of a single transaction for the complainants, involving just 700 shares; and it will be noted further that, while the bill does not allege at what price Schwartz, Dupee & Co. were directed to make the sale, its allegations clearly mean, and are intended to convey the impression, that the alleged sale of August 3, of *1,150* shares at $222, was the one which Schwartz, Dupee & Co. made in fulfillment of the order. So that the theory of the bill is of an order to Schwartz, Dupee & Co. to sell 700 shares, which was fulfilled by them by a sale at $222, this sale being a part of an entire contract for 1,150 shares.

We call the court's attention to this, the fundamental theory of the bill, because it *is concededly not true*. Turn-

ing now to the actual, admitted facts, we find that there never was a single transaction for 700 shares, even between complainants and their own brokers, but that the matter of 700 shares was itself made up of two wholly separate and distinct contracts. The first of these was a sale by Schwartz, Dupee & Co., on July 25th, of 500 shares at $229. This was in accordance with a telegraphic order of that date, and they reported to Clews & Co. the sale at that figure. (*Record, p. 41.*) (These sales made in July for August delivery are called in the evidence "sales for the second account," *i. e.*, for delivery during the month following the order.) The other 200 shares was a separate sale, on July 27th, at $229, reported on the same day by Schwartz, Dupee & Co. to Clews & Co. (*Record, p. 42.*) So far as Clews & Co. were concerned, it is clear that these were two separate transactions—one of 500 and one of 200 shares—that they were informed that their orders were filled, and of the prices at which the contracts of sale had been made.

It is admitted that neither of these sales produced a contract, either between Schwartz, Dupee & Co. or Clews & Co. and Jamieson & Co. The sale of the 500 shares, as shown by the account of Schwartz, Dupee & Co., was to four different brokers for different amounts, all of them aggregating 500 shares, of which Jamieson & Co. bought only fifty. (*Record, p. 77.*) An examination of the account of Schwartz, Dupee & Co. on July 27th, the date of the sale of the 200 shares, will show clearly that, if it can be considered as an actual transaction at all, it was canceled on the same day. For the only sale made at $229 (the price at which they reported to Clews & Co. they had sold the 200 shares) was a sale to *R. A. Peters,* which was canceled by a purchase from him of the same amount at the same figure, thus wiping that transaction out entirely;

and Schwartz, Dupee & Co. treated it in their clearing house statement as being canceled. The other sales of that day were not original transactions at all, but were substitutions from prior days, and were at $228. And there was no sale at all to Jamieson & Co. (*Record, p. 80.*)

It is obvious that, thus far in the transaction, Jamieson & Co. had not become bound for either 500 or 200 shares; for they were not the persons to whom the stock was sold; and they concededly did not come into the transaction as parties to any contract involving more than fifty shares until August 3rd. Now, in the meantime, all of these substitutions took place between the brokers, the effect of which was that the brokers each day settled between themselves by offsetting their purchase and sale accounts with each other. Without following the mere book-keeping chain of these two items of 500 and 200 shares through the account to the subsequent dates, it will be sufficient, we think, to say that, from the very nature of the transaction, it was not contemplated that the new contracts, which were daily made in substitution—between the brokers—of the contracts of the previous day, made new contracts *for any of their principals,* or changed their liability. This is expressly stated in the written stipulation of facts in this case, from which we quote:

> "These transactions (the original contracts made by the brokers for their clients), so far as the different principals are concerned, were not settled or canceled by any of the substitutions, nor by any of the settlements between the brokers, except so far as when one client or principal of a broker was, through such broker, both a purchaser and a seller. In other words, the settlements by substitution or otherwise, through the clearing house, were merely settlements between the members of the Stock Exchange, and were not settlements or cancellations of the contracts

between the principals whom the brokers represented, and the brokers themselves, except where the same broker had both purchased and sold for the same client." (*Record, p. 89.*)

Now the result of this seems to us clearly to be this: On July 25th and on July 27th Clews & Co., through Schwartz, Dupee & Co., made contracts for the delivery on August 31st of 500 and 200 shares of stock, at $229. These contracts are admitted to have remained unaffected, so far as Clews & Co. were concerned, by the subsequent clearing house proceedings. They, therefore, could never be held by any one to a liability on those contracts at any other price than $229; nor, on the other hand, could they enforce the contracts, except according to their terms.

Who was the other party to those contracts? Concededly it was not Jamieson & Co., and it is perhaps unnecessary for the purposes of this case to go further in determining who it was. But it clearly was the person or persons represented by the other broker to whom the stock was first sold, and it is conceded by the stipulation that the liability of the principal or principals whom that broker represented was unaffected by the subsequent substitutions, and that the rights and liabilities of Clews & Co., on the other side, also remained unaffected.

The result of this is that the only contracts which Clews & Co. made were those of July 25th and 27th for 500 and 200 shares at $229; and those contracts the bill does not seek to enforce, but, in effect, to repudiate. As a mere question of pleading, it is plain that the complainants could not recover on a different contract from that which they alleged in their bill, to say nothing of their right to recover on a theory opposed to that set out in the bill.

The question in this case is, of course, not whether

Jamieson & Co. were liable to Schwartz, Dupee & Co., on the substituted contract of August 3rd, nor what their liability was, but whether they were liable to Clews & Co. Inasmuch as Clews & Co. concededly still stood upon their original contracts at $229, which were unaffected by the substitutions, that fact alone would seem to answer any contention that they were either parties to the substituted contract, or secured any rights under it against Jamieson & Co. But, waiving that question, is it not plain that if Jamieson & Co. were seeking to enforce this contract against Clews & Co., they must, upon the conceded facts, surely fail? That substitution either made a contract for 1,150 shares, or it made no contract whatever. Jamieson & Co. were entitled to receive and were compellable to receive 1,150 shares; no more, no less, and at $222; no more, no less. The obligation of delivery on the other side was simply reciprocal. Therefore, if Clews & Co. were parties on one side of that contract, they could be held liable upon it according to its terms; and that is to say, that they were liable to deliver 1,150 shares at $222, and that this liability could be enforced against them.

Of course, in this case there was a profit to them in the fall in the price, and the mysterious disappearance of this profit is one of the elements which go to show that no contract was made between the different principals by these substitutions. But, waiving that, the theory that Clews & Co. entered into a different contract each day that a substitution was made, of course, carries with it the necessary concession that they would be liable upon that contract if the market had gone the other way. So that it is an essential part of the complainant's theory that if this stock had gone up to $250, Clews & Co. could not only have been

held liable by Jamieson & Co. for this advance price, but liable for the delivery of 1,150 shares, although they had contracted to deliver only 700 shares, and that at $229.

This theory involves this further patent absurdity: As all of the trades which Schwartz, Dupee & Co. had for all their customers in Diamond Match for the August account went each day into the settlement in the clearing house, which resulted in the substitutions of the following day, all were interested as parties in the resultant substituted contracts; and, in effect, the result would be that all the clients of Schwartz, Dupee & Co. became liable each day upon the changing clearing house balance which that firm had in Diamond Match for the August account. The changing balances in the clearing house might some day make Schwartz, Dupee & Co. short, sometimes long; they would sometimes be buyers for such an amount that their seller contracts would be either wiped out, or be for so small an amount that they would not aggregate in all 700 shares.

And yet the theory of the petitioners is that, through all these manifold changes, designed only for settlements between brokers, there ran some definite kind of an arrangement which was ultimately to make Clews & Co. liable upon whatever balance remained on any particular day, as the result of these settlements. It seems to us a perfectly plain proposition that such a result could not have been produced by two simple orders to a broker to sell 500 and 200 shares at $229, and a report from him to his principal on the same day that he had executed the order according to its terms.

Turning now from the questions which affect the formation of the alleged contract between Clews & Co. and Jamieson & Co., let us look to the performance of it.

The contract was unquestionably an entire one, for the sale and delivery of 1,150 shares, and it is so alleged in the pleadings. The complainants further alleged that the tender to Jamieson & Co. was of 1,150 shares. In effect, the complainants are now claiming upon a contract for 700 shares, and upon the theory that Jamieson & Co. were in default for not accepting that number. Yet it is conceded that there never was a tender to Jamieson & Co. of 700 shares, and after Clews & Co. notified Jamieson & Co. that they were the interested parties in the transaction, they made no new tender of fulfillment of that part of the contract of which they sought performance.

Now, as to the sale which was made by the petitioners for the purpose of fixing the amount of their damages. This sale is of importance only as a means of fixing the measure of the liability of Jamieson & Co. upon the theory that they had made a contract of purchase and had refused a lawful tender of the stock.

Waiving the question for the present whether a lawful sale could be made, except upon the exchange in accordance with its rules, this sale was a mere fiction. These are the facts: Clews & Co. did not have this stock to offer for sale. They did not buy it from Schwartz, Dupee & Co. for the purpose of making a sale. They merely borrowed from Schwartz, Dupee & Co. 700 shares to offer at the sale, agreeing that if any one took it, they would replace the stock; otherwise they would simply return that which they borrowed. Now it is conceded that no one did buy the stock; that it was simply handed over to some one who paid no money for it, and who handed it right back to Schwartz, Dupee & Co., in accordance with the agreement. It was not a statement of a conclusion, but a simple statement of the transaction, when Mr.

Comstock, the petitioners' witness, said: "The stock all the time was the property of Schwartz, Dupee & Co., both before and after the 22d of September,"—the date of the sale. (*Record, pp. 155-6.*

When it is remembered that a *bona fide* offer of $135 was made for 200 shares of this stock at the sale, the inequity—not to say iniquity—of using a sale of this kind, which did not pass anything to any one, as a means of measuring the defendants' liability, is very apparent.

Aside from the fact that the petitioners made this fictitious sale, and are relying on it to make out a cause of action in a court of equity, they do not show performance of the contract, even if it had been a genuine one.

If a contract was made between the parties, then it is admitted to have been one of which the rules of the exchange formed a part. A liability under it could therefore arise only when those rules had been followed.

Those rules provide a specific mode of settling and ascertaining the amount of the damage which has been caused by a default in such a contract.

Article 17 of the by-laws of the Exchange (*Record, p. 37-8*) provides that should any member neglect to fulfill his contract on the day it became due, the party contracting with him should, after giving notice, employ an officer of the board to close the same forthwith, in the exchange, by purchase or sale, as the case might be.

It is further provided, that if the creditor fails to close the contract by this method, then that the price should be fixed by the price current at the time such contract should have been closed, under the rule.

The plain object of this rule was to prevent any unfairness which might result from offering the stock

for sale on the street, or at some place where men were not in the habit of meeting for the purpose of buying or selling stocks. A sale on the exchange would, where buyers are always present, surely produce the fair value of the stock, and it was within the power of the parties, and plainly to their mutual interest, to provide a mode of conducting the sale which would furnish the legal means of ascertaining the amount of damage occasioned by the failure to accept the stock.

If our view of the contract is correct, and Jamieson & Co. were entitled to have the amount of their liability fixed by a sale on the exchange, or by the price then current, as the rules provide, then no right of recovery was shown. For no attempt was made by the petitioners to comply with the rule. On the contrary, during a mere temporary closing of the exchange, they made this fictitious sale, and filed their bill to collect the damages which they claimed to have thus fixed.

We submit that the decree dismissing the bill for want of equity was a just determination of the case, that no cause has been shown for reviewing the decision by *certiorari,* and that the petition should be denied.

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